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No. 07-802

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In the Supreme Court of the United States

MARRITA MURPHY, PETITIONER

v.

INTERNAL REVENUE SERVICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether compensatory damages received for emotional distress and loss of reputation qualify as taxable gross income under Section 61(a) of the Internal Revenue Code, 26 U.S.C. 61(a).

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Discussion 6
Conclusion 17

TABLE OF AUTHORITIES

Cases:

Ballmer v. *Commissioner*, 94 T.C.M. (CCH) 338 (2007) 17
Brushaber v. *Union Pac. R.R.*, 240 U.S. 1 (1916) 7
Burk-Waggoner Oil Ass'n v. *Hopkins*, 269 U.S. 110 (1925) 10
Clayton v. *United States*, No. 06-1976, 2007 WL 3390463 (4th Cir. Nov. 13, 2007) 16
Commissioner v. *Banks*, 543 U.S. 426 (2005) 11
Commissioner v. *Glenshaw Glass Co.*, 348 U.S. 426 (1955) 9, 11, 12, 13
Commissioner v. *Schleier*, 515 U.S. 323 (1995) 16
County of Los Angeles v. *Davis*, 440 U.S. 625 (1979) 17
Dotson v. *United States*, 87 F.3d 682 (1996) 12
Fernandez v. *Wiener*, 326 U.S. 340 (1945) 9
Hawkins v. *Commissioner*, 94 T.C.M. (CCH) 310 (2007) 17
Knight v. *Commissioner*, 128 S. Ct. 782 (2008) 6

Cases—Continued: Page

Leveille v. *New York Air Nat'l Guard:*
ARB No. 98-079, 1999 WL 966951 (DOL Admin. Rev. Bd. Oct. 25, 1999) 2, 16
ARB No. 94-TSC-3, 1995 WL 848112 (DOL Off. Admin. App. Dec. 11, 1995) 2
O'Gilvie v. *United States*, 519 U.S. 79 (1996) 12
Pollock v. *Farmers' Loan & Trust Co.*, 158 U.S. 601 (1895) 7
Stone v. *INS*, 514 U.S. 386 (1995) 8
Tyler v. *United States*, 281 U.S. 497 (1930) 15
United States v. *Fausto*, 484 U.S. 439 (1988) 14
United States v. *Welden*, 377 U.S. 95 (1964) 14
White v. *United States*, 305 U.S. 281 (1938) 13

Constitution, statutes and regulation:

U.S. Const.:
Art. I 6, 8
§ 2 5
§ 8 ..... 5, 8
Cl. 1 8
§ 9 ..... 4, 5, 9
Cl. 4 ..... 4, 8, 14
Amend. XVI 4, 7, 10
Employees Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq.* 12
Internal Revenue Code (26 U.S.C.):
§ 1 (2000 & Supp. V 2005) 6
§ 61(a) ..... *passim*

Statutes and regulation—Continued: Page

§ 63(a)-(b) 6
§ 104(a) 7
§ 104(a)(2) ..... *passim*
Revenue Act of 1913, ch. 16, § II(B), 38 Stat. 167 ..... 6, 11
Revenue Act of 1918, ch. 18, § 213(b)(6), 40 Stat. 1066 ..... 7, 11
Small Business Job Protection Act of 1996, Pub. L. No. 104-188, § 1605(a), 110 Stat. 1838 ..... 3, 7
26 C.F.R. 1.104-1(c) 12

Miscellaneous:

H.R. Rep. No. 586, 104th Cong., 2d Sess. (1996) 8
Rev. Rul. 74-77, 1974-1 C.B. 33 11
Rev. Rul. 98-37, 1998-2 C.B. 133 11
Solicitor's Op. No. 132, 1-1 C.B. 92 (Bureau of Int. Rev. 1922) 11
Robert W. Wood, *Waiting to Exhale:* Murphy *Part Deux and Taxing Damages* Awards, 116 Tax Notes 265 (2007) 16

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-38) is reported at 493 F.3d 170. An earlier opinion of the court of appeals (Pet. App. 39-67) is reported at 460 F.3d 79. The order of the court of appeals vacating the original decision and granting panel rehearing (Pet. App. 68-69) is unreported. The opinion of the district court (Pet. App. 72-92) is reported at 362 F. Supp. 2d 206.

JURISDICTION

The judgment of the court of appeals was entered on July 3, 2007. A petition for rehearing was denied on September 14, 2007 (Pet. App. 95-96). The petition for a writ of certiorari was filed on December 13, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1994, petitioner filed an administrative complaint with the United States Department of Labor (DOL) against her former employer, the New York Air National Guard (NYANG), alleging that it had discriminated against her for engaging in conduct protected by the whistleblower provisions of six federal environmental statutes. Pet. App. 3; *id.* at 73-74 (citing statutes). DOL ruled in favor of petitioner and remanded the case to an administrative law judge (ALJ) "for findings on compensatory damages." *Id.* at 3; *Leveille* v. *New York Air Nat'l Guard*, No. 94-TSC-3, 1995 WL 848112, at *3 (DOL Off. Admin. App. Dec. 11, 1995).

Based on evidence that NYANG's unlawful actions had caused petitioner to suffer from stress and stress-related disorders, including bruxism (or tooth-grinding), anxiety attacks, shortness of breath, and dizziness, the ALJ recommended that petitioner receive $45,000 in compensatory damages for "past and future emotional distress" and $25,000 for "injury to * * * vocational reputation." DOL adopted the ALJ's recommendation. Pet. App. 3-4, 74-75; *Leveille* v. *New York Air Nat'l Guard*, ARB No. 98-079, 1999 WL 966951, at *5 (DOL Admin. Rev. Bd. Oct. 25, 1999).

Petitioner reported the $70,000 damages award on her federal income tax return for the year 2000. Petitioner later filed amended tax returns in which she sought a refund of the taxes she had paid on the damages award, in the amount of $20,865. See C.A. App. 8 (Compl. ¶¶ 7-10). Petitioner based her refund request on Section 104(a)(2) of the Internal Revenue Code (Code), which provides that "gross income does not include * * * damages * * * received * * * on account of personal physical injuries or physical sickness."

26 U.S.C. 104(a)(2). The Internal Revenue Service (IRS) denied the claim on the ground that petitioner had not shown that the compensatory damages were received on account of a physical injury or physical sickness, determining that the damages award was therefore taxable. Pet. App. 4, 75.

2. Petitioner filed a tax refund suit in the United States District Court for the District of Columbia against the United States and the IRS. C.A. App. 6-13 (Compl. ¶¶ 4-5). The district court granted summary judgment in favor of the government on the merits of petitioner's suit. Pet. App. 72-92. The court ruled that petitioner's damages award is taxable "gross income," a term broadly defined in Section 61(a) of the Internal Revenue Code as "all income from whatever source derived," 26 U.S.C. 61(a). Pet. App. 80-81. The court further held that petitioner's damages for emotional distress and loss of reputation are not excludable from gross income under the Code's personal-injury exemption, 26 U.S.C. 104(a)(2). The court noted that, prior to 1996, Section 104(a)(2) provided that gross income does not include "the amount of any damages * * * received . . . on account of *personal* injury or sickness," but that in 1996, Congress amended the provision to except from the exclusion from gross income only compensatory damages received "on account of *physical injuries or physical sickness*." Pet. App. 81-82 (citation omitted); see Small Business Job Protection Act of 1996 (1996 Act), Pub. L. No. 104-188, §1605(a), 110 Stat. 1838. The court held the amendment made clear Congress's intent not to include damages received on account of emotional distress or injury to reputation within the scope of the personal-injury exemption. Pet. App. 82. Although the court acknowledged that petitioner's emotional distress

"manifested into a physical problem, bruxism," it ruled that the emotional distress award nevertheless does not qualify under Section 104(a)(2) because petitioner did not receive the award "on account of" her bruxism: "[Bruxism] was only a symptom of her emotional distress, not the source of her claim." *Id.* at 85.

Finally, the district court rejected petitioner's arguments that taxation of her damages award is unconstitutional because, *inter alia*, (1) taxation of compensatory damages constitutes a "direct tax" on personal property that must be apportioned under Article I, Section 9, see U.S. Const. Art. I, § 9, Cl. 4; and (2) compensatory damages are not "income" for purposes of the Sixteenth Amendment, which authorizes Congress to "lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration," U.S. Const. Amend. XVI. The court held that petitioner's argument failed in light of the "broad interpretation of the taxing power and the definition of income." Pet. App. 92.

3. In its initial opinion, the court of appeals reversed. Pet. App. 39-67. Like the district court, the court of appeals concluded that Section 104(a)(2) does not permit petitioner to exclude the damages award from gross income because it was not received "on account of personal physical injuries or physical sickness," 26 U.S.C. 104(a)(2). Pet App. 45-49. The court held, however, that taxation of the award was nevertheless improper because taxation of compensatory damages, including damages awarded for emotional distress and loss of professional reputation, exceeds "the power of the Congress to tax income" under the Sixteenth Amendment. *Id.* at 49-66.

4. The government petitioned for rehearing en banc. In response, the court of appeals vacated its earlier opinion and ordered panel rehearing. Pet. App. 68-69. After rehearing, the panel affirmed the judgment of the district court. *Id.* at 1-38.

The court first determined that petitioner's damages award constitutes taxable "gross income" under Section 61(a), when the statute is read in combination with Section 104(a)(2), as amended by the 1996 Act. Pet. App. 22. The court noted that Congress amended Section 104(a)(2) "to narrow the exclusion to amounts received on account of 'personal physical injuries or physical sickness' from 'personal injuries or sickness,' and explicitly to provide that 'emotional distress shall not be treated as a physical injury or physical sickness.'" *Id.* at 21. The court held that, "[f]or the 1996 amendment of § 104(a) to 'make sense,' gross income in § 61(a) must * * * include an award for nonphysical damages such as [petitioner] received." *Id.* at 23.

The court of appeals further held that taxation of the damages award does not exceed Congress's constitutional taxation authority. The court noted that Congress's taxation power rests broadly on Article I, Section 8 of the Constitution, which provides that "[t]he Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises." The court identified two relevant restrictions on Congress's exercise of that power: (1) "direct taxes" must be apportioned by population, and (2) duties, imposts and excises must be uniform throughout the nation. Pet. App. 24 (citing U.S. Const. Art. I, §§ 2, 8, 9). The court held that a tax on personal injury damages is not a "direct tax" requiring apportionment, since direct taxes have generally been understood to include "a capitation or a tax upon one's ownership of

property." *Id.* at 25, 33. The court held that the tax on petitioner's award was more like "a tax upon a use of property, a privilege, an activity, or a transaction," and thus was akin to an excise tax. *Id.* at 33-37. The court compared petitioner's situation to an involuntary conversion of assets, in which petitioner "was forced to surrender some part of her mental health and reputation in return for monetary damages." *Id.* at 34. Noting that "[t]he tax laid upon an award of damages for a nonphysical personal injury operates with 'the same force and effect' throughout the United States," the court further concluded that the tax satisfied the Article I uniformity requirement. *Id.* at 37.

DISCUSSION

The court of appeals correctly concluded that compensatory damages received for emotional distress and loss of professional reputation qualify as taxable "gross income" under Section 61(a) of the Internal Revenue Code, 26 U.S.C. 61(a). Its decision does not conflict with any decision of this Court or of any other court of appeals. Further review is unwarranted.

1. a. The Internal Revenue Code imposes a tax on "taxable income," which the Code defines as "gross income" adjusted for various deductions allowed by statute. 26 U.S.C. 1 (2000 & Supp. V 2005); 26 U.S.C. 63(a)-(b). "Gross income" is "capaciously defined" in Section 61(a) of the Code as "all income from whatever source derived." *Knight* v. *Commissioner*, 128 S. Ct. 782, 785 (2008); 26 U.S.C. 61(a).

Section 61(a) has its origins in Section II(B) of the Revenue Act of 1913, which was enacted shortly after

adoption of the Sixteenth Amendment.[1] See Revenue Act of 1913, ch. 16, § II(B), 38 Stat. 167 ("[T]he net income of a taxable person shall include * * * income derived from any source whatever."). A few years after the passage of the Revenue Act of 1913, Congress enacted an exclusion from gross income for "[a]mounts received, through accident or health insurance or under workmen's compensation acts, as compensation for personal injuries or sickness, plus the amount of any damages received whether by suit or agreement on account of such injuries." Revenue Act of 1918, ch. 18, § 213(b)(6), 40 Stat. 1066. That exclusion has been amended several times since it was first enacted. In 1996, Congress amended that provision to exclude from gross income "damages * * * received * * * on account of personal physical injury or physical sickness." 26 U.S.C. 104(a)(2); see 1996 Act §1605(a), 110 Stat. 1838. As amended, the statute provides that "emotional distress shall not be treated as a physical injury or physical sickness" for purposes of the exclusion. 26 U.S.C. 104(a).

b. The court of appeals correctly held that compensatory damages received for emotional distress and loss of reputation are taxable as income under Section 61(a). Such damages are explicitly excluded from the personal-injury exemption, as that provision was amended by the 1996 Act. As the court correctly noted, "[f]or the 1996 amendment of § 104(a) to 'make sense,' gross income in

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[1] The Sixteenth Amendment was "drawn for the purpose of doing away for the future with the principle" underlying this Court's decision in *Pollock* v. *Farmers' Loan & Trust Co.*, 158 U.S. 601 (1895), which held that a tax on income from real and personal property was a direct tax requiring apportionment. *Brushaber* v. *Union Pac. R.R.*, 240 U.S. 1, 18 (1916).

§ 61(a) must * * * include an award for nonphysical damages such as [petitioner] received." Pet. App. 23; see *id.* at 22 (citing *Stone* v. *INS*, 514 U.S. 386, 397 (1995)). That conclusion is, moreover, supported by the legislative history of the 1996 Act, which indicates that Congress understood that the amended statute would "[i]nclude in income damage recoveries for nonphysical injuries." H.R. Rep. No. 586, 104th Cong., 2d Sess. 143 (1996); see Pet. App. 22 n.*.

c. Congress's decision to tax nonphysical personal injury damages is, as the court of appeals correctly concluded (Pet. App. 24-37), well within Congress's "Power To lay and collect Taxes, Duties, Imposts and Excises" under Article I, Section 8. U.S. Const. Art. I, § 8, Cl. 1. As relevant here, there are two restrictions on Congress's exercise of its Article I taxing power: duties, imposts, and excises must be uniform throughout the nation, and "direct taxes" must be apportioned by population. See *id.* Art. I, § 8, Cl. 1; *id.* Art. I, § 9, Cl. 4. The court of appeals correctly determined that the tax challenged in this case does not violate either restriction.

As a preliminary matter, the court of appeals correctly held (Pet. App. 37), and petitioner does not dispute, that the tax challenged in this case applies uniformly nationwide. The court of appeals also correctly held (*id.* at 24-37) that a tax on damages for nonphysical personal injuries is not a direct tax and, thus, is not subject to the apportionment requirement of Article I, Section 9. Although the court acknowledged that the boundary between direct and indirect taxes has not been "definitively marked," the court observed that "three taxes are definitely known to be direct: (1) a capitation, (2) a tax upon real property, and (3) a tax upon personal property." *Id.* at 25 (citation omitted). The court con-

trasted those taxes, which must be apportioned under Article I, Section 9, with "excise taxes laid 'upon a particular use or enjoyment or property or the shifting from one to another of any power or privilege incidental to the ownership or enjoyment of property,'" which are not subject to the apportionment requirement. *Ibid.* (quoting *Fernandez* v. *Wiener*, 326 U.S. 340, 352 (1945)); see *Wiener*, 326 U.S. at 362 ("A tax imposed upon the exercise of some of the numerous rights of property is clearly distinguishable from a direct tax, which falls upon the owner merely because he is owner, regardless of his use or disposition of the property."). The court correctly concluded that the tax at issue in this case is more akin to the latter than the former, reasoning that a tax on damages received on account of nonphysical personal injury is not a tax on the ownership of property, but rather, a tax on the *receipt* of the damages. Pet. App. 33.

2. Petitioner contends (Pet. 15-22) that the court of appeals erred in concluding that her damages award qualifies as taxable gross income under Section 61(a) without first deciding whether the award qualifies as "income" as this Court construed the term in *Commissioner* v. *Glenshaw Glass Co.*, 348 U.S. 426 (1955). See Pet. App. 19-20. In *Glenshaw Glass*, the Court held that, under the Internal Revenue Code of 1939, "income" includes "undeniable accessions to wealth, clearly realized, and over which the taxpayers have complete dominion." 348 U.S. at 431. Petitioner in this case contends that her compensatory damages award was designed to make her "whole" by restoring a personal loss, and therefore does not constitute an "accession to wealth" under *Glenshaw Glass*. Pet. 15-17.

a. Petitioner's contention overlooks the basis of the court of appeals' holding: namely, that whatever the term "income" may once have meant under the Internal Revenue Code, Congress made clear in the 1996 Act that gross income under Section 61(a) includes damages for nonphysical personal injuries, and that such damages are therefore taxable. See Pet. App. 19-24.

Petitioner correctly observes (Pet. 17) that Congress based the Code's definition of the term "income" on the term "incomes" in the Sixteenth Amendment. But that does not mean that, contrary to the court of appeals' reasoning, "income" under Section 61(a) has a constitutionally mandated meaning not susceptible to congressional revision. As the court of appeals explained, the relationship between Section 61(a) and the Sixteenth Amendment means that "'[g]ross income' in § 61(a) is *at least as broad* as the meaning of 'incomes' in the Sixteenth Amendment." Pet. App. 14 (emphasis added). It does not mean that "gross income" in Section 61(a) must be *limited* to the meaning of "incomes" under the Sixteenth Amendment. *Id.* at 20. "[A]lthough the 'Congress cannot make a thing income which is not so in fact,' it can *label* a thing income and tax it, so long as it acts within its constitutional authority, which includes not only the Sixteenth Amendment but also Article I, Sections 8 and 9." *Ibid.* (quoting *Burk-Waggoner Oil Ass'n* v. *Hopkins*, 269 U.S. 110, 114 (1925)).

b. In any event, although the court of appeals deemed it unnecessary to decide the question (Pet. App. 20), petitioner's damages award would have qualified as "income" *both* before *and* after the 1996 Act. Contrary to petitioner's argument, her $70,000 cash award constitutes "income" as that term was interpreted in *Glenshaw Glass*: It is an accession to wealth, clearly real-

ized, over which she has complete dominion. See *Glenshaw Glass*, 348 U.S. at 431; see also *Commissioner* v. *Banks*, 543 U.S. 426, 433 (2005) (gross income "extends broadly to all economic gains"). That the damages were received in an effort to make petitioner "whole" for the personal injuries she suffered does not change the fact that the method chosen to make her "whole" increased her wealth by $70,000.

Moreover, that Congress decided in the Revenue Act of 1918 to exclude personal injury damages from treatment as "income" in the first place (ch. 18, § 213(b)(6), 40 Stat. 1066) makes clear that such damages have always been considered "income" under Section 61(a) and its predecessors, beginning with Section II(B) of the Revenue Act of 1913. The 1996 amendment limiting the personal-injury exemption to damages received on account of *physical* personal injuries simply leaves no doubt that damages received for *nonphysical* personal injuries are taxable under the Code.

c. Contrary to petitioner's contention (Pet. 18-19), the decision below creates no conflict with administrative rulings or cases holding that amounts received for certain nonphysical personal injuries are not taxable as "income" under Section 61(a).

Petitioner relies on a 1922 Solicitor's opinion taking the position that money received for alienation of affection or for lost reputation is not "income," which was restated in—and "superseded" by—a 1974 Revenue Ruling on the same subject. See Solicitor's Op. No. 132, 1-1 C.B. 92 (Bureau of Int. Rev. 1922); Rev. Rul. 74-77, 1974-1 C.B. 33. But the Department of the Treasury (Treasury) has since withdrawn the 1974 Revenue Ruling as "obsolete." See Rev. Rul. 98-37, 1998-2 C.B. 133.

The decision below thus creates no conflict with Treasury's interpretation of the statute.[2]

Nor does the decision below conflict with this Court's decisions in *O'Gilvie* v. *United States*, 519 U.S. 79 (1996), or *Glenshaw Glass*, *supra*, or the Fifth Circuit's decision in *Dotson* v. *United States*, 87 F.3d 682 (1996). *O'Gilvie* and *Dotson* concern the Internal Revenue Code's personal-injury exemption as it existed before the effective date of the 1996 Act, and the courts in those cases thus had no occasion to consider the meaning and effect of the Act's explicit exclusion of nonphysical personal injury damages from the scope of the exemption. See *O'Gilvie*, 519 U.S. at 81, 84-86 (interpreting pre-amendment personal-injury exemption and concluding that its history and "basic approach" "suggest that there is no strong reason for trying to interpret the [exemption] to reach beyond those damages that, making up for a loss, seek to make a victim whole"); *Dotson*, 87 F.3d at 684-689 (holding that damages payable under settlement of claims brought under the Employees Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq.*, were excludable from gross income as "personal injury" damages under pre-amendment version of Section 104(a)(2)). In both cases, the court concluded that Congress did not intend to tax personal injury recoveries as "income," but

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[2] Petitioner also notes (Pet. 14, 34) that an IRS regulation states that "Section 104(a)(2) excludes from gross income the amount of any damages received (whether by suit or agreement) on account of personal injuries or sickness," and does not explicitly limit the scope of the exemption to physical injuries or physical sickness. 26 C.F.R. 1.104-1(c). As petitioner herself notes (Pet. 34), however, the IRS regulation has not been revised since the 1996 Act. The regulation thus cannot conceivably be read to mean that the IRS interprets the statute, *as amended*, to exclude nonphysical personal injury damages from gross income. See Pet. App. 13 n.*.

neither case holds that Congress *cannot* tax such recoveries if it so chooses.

In *Glenshaw Glass*, the Court noted the "long history of departmental rulings holding personal injury recoveries nontaxable on the theory that they roughly correspond to a return of capital," but held that such rulings could not "support exemption of punitive damages." 348 U.S. at 432 n.8. The Court did not, however, thereby hold that personal injury damages constitute a constitutionally or statutorily mandated exception to the Code's broad definition of "income." Cf. *id.* at 431.

3. Petitioner next contends (Pet. 22-25) that the court of appeals' interpretation of Sections 61(a) and 104(a), as amended by the 1996 Act, violates two "cardinal rule[s] of construction": the purported rule that revenue-raising laws are construed against their drafter, and the rule disfavoring amendments by implication. Petitioner's arguments are without merit.

First, the alleged rule of tax lenity to which petitioner refers finds no support in this Court's modern tax jurisprudence, cf. Pet. 23 (citing cases), and is in any event inapplicable in this case. This Court has explained:

> It is the function and duty of courts to resolve doubts. We know of no reason why that function should be abdicated in a tax case more than in any other where the rights of suitors turn on the construction of a statute and it is our duty to decide what that construction fairly should be.

White v. *United States*, 305 U.S. 281, 292 (1938). The court of appeals in this case exercised that function when it interpreted Section 61(a) in light of the 1996 Act. As the court correctly held, "reading § 61 in combination with § 104(a)(2) of the Internal Revenue Code presents a * * * picture so clear that [there is] no occasion to

apply the canon favoring the interpretation of ambiguous revenue-raising statutes in favor of the taxpayer." Pet. App. 21.

Second, contrary to petitioner's argument (Pet. 23-25) the court of appeals did not err in holding that it was unnecessary to decide whether damages for nonphysical personal injury qualified as "income" under Section 61(a) before 1996, because "even if the provision did not do so prior to 1996, * * * Congress implicitly amended § 61 to cover such an award when it amended § 104(a)." Pet. App. 22. Although "[a]mendments by implication, like repeals by implication, are not favored," *United States* v. *Welden*, 377 U.S. 95, 103 n.12 (1964), this Court "has also noted * * * that the 'classic judicial task of reconciling many laws enacted over time, and getting them to "make sense" in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute,'" Pet. App. 22-23 (quoting *United States* v. *Fausto*, 484 U.S. 439, 453 (1988)). As the court of appeals correctly held, "[f]or the 1996 amendment of § 104(a) to 'make sense,' gross income in § 61(a) must * * * include an award for nonphysical damages." *Id.* at 23.

4. Petitioner erroneously asserts (Pet. 28-31) that taxation of nonphysical personal injury damages constitutes a direct tax, and therefore is subject to the apportionment requirement of Article I, Section 9. According to petitioner, "[t]axing damages awarded for personal injuries to restore health or reputation is a direct tax on the person, because the money is intended to make a person whole for a human capital loss." Pet. 31. But as the court of appeals held, the tax challenged in this case is not a tax on petitioner's ownership of what she calls her human capital; rather, "[petitioner] is taxed only

after she receives a compensatory award, which makes the tax seem to be laid upon a transaction." Pet. App. 33. Such a tax is not subject to the apportionment requirement. See *ibid.* (citing, *inter alia*, *Tyler* v. *United States*, 281 U.S. 497, 502 (1930)).

Petitioner also criticizes the court for analogizing her situation to "to an involuntary conversion of assets," wherein "she was forced to surrender some part of her mental health and reputation in return for monetary damages." Pet. App. 34. Petitioner argues that any attempt to liken "human health" to property or "tax[ ] civil rights plaintiffs for the 'privilege' of utilizing the legal system" is against public policy. Pet. 28, 30. Petitioner misses the point of the court's analogy, which was merely to illuminate the question whether the tax at issue in this case is more akin to a tax on ownership of property, or to a tax on the use of property, a privilege, or a transaction. In any event, the policy implications of taxing personal injury damages are matters for the consideration of Congress, not the courts, and Congress presumably weighed those matters when it elected in the 1996 Act to make clear that the personal-injury exemption does not extend to damages for nonphysical injuries.

5. Petitioner also contends (Pet. 31-33) that the court of appeals erred in holding that her damages award is not excludable from gross income under Section 104(a)(2), because the award was in fact received "on account of" a physical injury or physical sickness: namely, the physical manifestations of her emotional distress, including permanent injury to her teeth caused by bruxism. Petitioner's contention is without merit, and the court's factbound determination does not warrant this Court's review.

As this Court explained in *Commissioner* v. *Schleier*, 515 U.S. 323 (1995), Section 104(a)(2) excludes from gross income that portion of a damages recovery that is "intended to compensate" for a covered personal injury. *Id.* at 329. DOL's decision made clear that it awarded damages for "emotional distress or mental anguish" and "injury to professional reputation." Pet. App. 11-12. There is no indication in that decision that petitioner's award was intended to compensate for her bruxism—which is not so much as mentioned in DOL's decision—or for any other physical injury or physical sickness. See *id.* at 11-13, 48; see also *id.* at 84-85; *Leveille*, 1999 WL 966951, at *2-*5.

6. Finally, contrary to petitioner's assertion (Pet. 33-36), the court of appeals' decision does not decide an important question of federal law in a manner that calls for this Court's review, in the absence of a conflict among the circuits. Although the court of appeals' initial opinion received significant attention in the tax bar because of its erroneous holding that taxation of compensatory damages for nonphysical personal injuries is unconstitutional, the court of appeals corrected that error on panel rehearing. Further review is not warranted.[3]

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[3] Petitioner asserts that there continues to be "confusion and ambiguity" in the wake of the court of appeals' decision on panel rehearing, and predicts that, because the "Court of Appeals never directly repudiated or overruled its prior decision holding that Murphy's compensatory damages are not income," "the unresolved issues will 'fuel tax cases for years to come.'" Pet. 14, 35 (quoting Robert W. Wood, *Waiting to Exhale:* Murphy *Part Deux and Taxing Damages* Awards, 116 Tax Notes 265, 265 (2007)). Petitioner's prediction is incorrect. The court of appeals repudiated its initial decision by *vacating* that decision and granting panel rehearing. Pet. App. 68. A number of courts have already rejected efforts by other taxpayers to rely on the court of appeals' vacated decision. See *Clayton* v. *United States*, No. 06-1976, 2007

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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WL 3390463 (4th Cir. Nov. 13, 2007) (per curiam) (unpublished); *Ballmer* v. *Commissioner*, 94 T.C.M. (CCH) 338, 340 (2007); *Hawkins* v. *Commissioner*, 94 T.C.M. (CCH) 310, 311 (2007). See generally *County of Los Angeles* v. *Davis*, 440 U.S. 625, 634 n.6 (1979) (vacatur of judgment of court of appeals "deprives that court's opinion of precedential effect") (citation omitted).